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No. 81-86

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LITTLE MOTOR COMPANY,
Petitioner,

versus

BRENDA LEE SUITS,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Where the Fifth Circuit Court of Appeals explicitly adopts the holding of the Fourth Circuit Court of Appeals in *Ryan v. Edwards*, 592 F.2d 756 (1979) and there is no conflict between the circuits should this Court grant the petition for writ of certiorari solely to re-weigh the evidence?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. The Decision Of The Fifth Circuit Explicitly Adopts The Standards Set Out By The Fourth Circuit And This Court Should Not Grant Certiorari To Review The Evidence And Facts Of This Specific Case 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

CASES: Page

Alley V. Dodge Hotel, 551 F.2d 442 (D.C. Cir. 1977) 4

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 2,4

Brady V. Southern Ry. Co., 320 U.S. 476 (1943) 4

Epoch Producing Corp. V. Killiam Shows, Inc., 552 F.2d 737 (2d Cir. 1975) 4

Jones v. Fenton Ford, Inc., 427 F. Supp. 1328 (D. Conn. 1977) 7

McCue v. Norwich Pharmacal Co., 453 F.2d 1033 (1st Cir. 1972) 4

Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978) 4

Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1212 (3rd Cir. 1970) 4

Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978) 7

TABLE OF AUTHORITIES (Continued)

Page

Rogers v. Missouri P. R. Co., 352 U.S. 500 (1956) 4

Ryan V. Edwards, 592 F.2d 756 (4th Cir. 1979) 3,4,5

Sentilles v. Inter Caribbean Shipping Corp., 361 U.S. 107 (1959) 4

Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (10th Cir. 1978) 4

United Cal. Bank v. THC Financial Corp., 557 F.2d 1351 (9th Cir. 1977) 4

United States v. Johnston, 268 U.S. 220 (1925) 3

STATUTES:

15 U.S.C. §1981 *et seq.* 1

15 U.S.C. §1988(a)(1) 6

15 U.S.C. §1988(a)(2) 6

TABLE OF AUTHORITIES (Continued)

ARTICLE:

Denial of Certiorari Despite a Conflict, 66 HARV.L.REV. 465 (1953) 6

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This case involves 15 U.S.C. §1981 *et seq.* On June 14, 1977, respondent bought a car from petitioner. The

vehicle's odometer showed 73 miles. Ten days earlier petitioner had purchased the car from Leiphart Chevrolet. At that time Leiphart had explicitly disclosed to petitioner that the odometer had 100,073 miles.

Following his customer practice, petitioner sold the car prior to receiving the odometer form in the mail. Despite knowing that the odometer had turned over, he made the following disclosure:

> I, Little Motor, state the odometer mileage indicated on the vehicle described below is Unknown miles.

He also checked:

> I further state the actual mileage differs from the odometer reading for reasons other than odometer calibration error and that the actual mileage is unknown.

Respondent brought suit under the Act and moved for summary judgment. The Magistrate recommended judgment for respondent. The district court rejected the recommendation. Trial ensued.

At trial respondent moved for directed verdict and jnov. The motions were denied. Respondent appealed and the Fifth Circuit reversed under the *Boeing Co. V. Shipman*, 411 F.2d 365 (5th Cir. 1969) standard. In reversing, the Fifth Circuit explicitly followed the

Fourth Circuit's holding in *Ryan v. Edwards*, 592 F.2d 756. (All facts herein are taken from the Fifth Circuit opinion.)

SUMMARY OF ARGUMENT

I.

The Fifth Circuit in this case specifically adopted the holding of the Fourth Circuit in *Ryan v. Edwards*, 592 F.2d 756 (1979). There is no conflict between the Circuits in enunciating the proper legal standards. At best, petitioner's argument amounts to a belief that the Fifth Circuit misapplied the correct legal theory to the facts. This Court should decline the invitation to reweigh facts in a matter of importance only to the parties involved.

ARGUMENT

I.

The Decision Of The Fifth Circuit Explicitly Adopts The Standards Set Out By The Fourth Circuit And This Court Should Not Grant Certiorari To Review The Evidence And Facts Of This Specific Case.

In *United States v. Johnston*, 268 U.S. 200, 227 (1925) this Court noted "We do not grant certiorari to review

evidence and discuss specific facts." *See generally Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 111-113 (1959) (dissent); *ibid.* 361 U.S. 107, 11 (1959) (dissent); *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 537 (1956) (dissent). The reason, of course, is that the results do not matter to the public but only to the parties involved. *Sentilles, supra* at 112. For this reason, this Court should decline petitioner's request (page 4 of its brief) to review the evidence.

To the extent that petitioner is seeking to have this Court review the appropriateness of the *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) standard review should be denied. Petitioner has shown no split in the various Circuits in their handling of the JNOV standards, *see Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1212 (3rd Cir. 1970); *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975). *McCue v. Norwich Pharmacal Co.*, 453 F.2d 1033 (1st Cir. 1972); *Alley v. Dodge Hotel*, 551 F.2d 442 (D.C. Cir. 1977); *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978); *United Cal. Bank v. THC Financial Corp.*, 557 F.2d 1351 (9th Cir. 1977); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (10th Cir. 1978), *see generally Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943) and respondent knows of none.

This Court is thus left with the allegation that the Fifth Circuit's decision is somehow in conflict with that of the Fourth Circuit in *Ryan v. Edwards*, 592 F.2d 756 (1979). It should be noted that a *Ryan* charge was

presented to the trial court which the trial court refused to give (Record to the Court of Appeals at R. 131). Indeed, during closing argument counsel for the petitioner argued:

> All right, this in itself is a violation really because the odometer doesn't show 100073. It just shows 000073.

(Trial Transcript. T. 78).

When counsel for Ms. Suits objected based on *Ryan v. Edwards*, the objection was overruled. (T. 78-79). Thus, at all times Ms. Suits has been arguing that *Ryan v. Edwards* did control. This is exactly what the Fifth Circuit said in following *Ryan*. Petitioner attempts to distinguish the fraud surrounding the *Ryan* case from the fraud involved in the instant case. But petitioner draws a distinction without a difference.

To begin with, the previous owner of the car told Donald Little that the mileage was 100,073 miles. Despite that knowledge and the fact that he later testified that at the time he sold the car that he knew the odometer had turned over, Donald Little affirmatively misstated that the mileage on the odometer was unknown. (These facts are taken from the Court of Appeals opinion at page 4(a)).

This is where the *Ryan*'s opinion comes in. The Fourth Circuit, 592 F.2d at 760 said:

> When a transferor who knows that an odometer has 'turned over' merely records the numbers appearing on the odometer and certifies that the true mileage is unknown, the consumer is not simply deprived of accurate information, he is actually misled by the form itself. We cannot belive that Congress intended to enact a statute requiring that consumers be given false or misleading information.

Indeed, the holding, 592 F.2d at 760-761 is even more explicit:

> We hold when a transferor knows that a vehicle's odometer has 'turned over' after registering 99,999 miles, the 'cumulative mileage' which must be stated to satisfy the requirements of §1988(a)(1) is the total of 100,000 plus the number actually appearing on the odometer. **A transferor may certify the mileage as 'unknown' §1988(a)(2),[1], only when he believes that for some other reason the odometer reading is inaccurate.[2]** (emphasis added).

1/ The two statutes cited appear in their entirety at 3(a) of the petitioner's brief.

2/ It should be noted that this interpretation concurs with interpretation of the Secretary of Transportation which has been effective since January 1, 1978. 592 F.2d at 761 fn. 6. Even if there was a conflict which respondent denies, certiorari should still be denied. Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV.L.REV. 465, 466-467 (1953).

This holding is exactly the holding of the Fifth Circuit in this case. (See the first page and page 6(a) of the petitioner's appendix.)

Moreover, as the Court noted (as quoted at 3(a)), there were additional factors which showed a clear intent to defraud. The instant petitioner maintained business practices which guaranteed such an intent. As the Fifth Circuit noted, "In our judgment Congress did not intend the Act to allow car dealers to operate in the manner Little did, such behavior manifests a clear intent to defraud." *See generally Nieto v. Pence*, 578 F.2d 640 fn. 3 (5th Cir. 1978); *Jones v. Fenton Ford, Inc.*, 427 F.Supp. 1328 (D. Conn. 1977).

Thus, the Fifth Circuit is completely in accord with the Fourth Circuit and there is no reason for this Court to grant the petition for certiorari.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should not be granted to review the Judgment of the United Stated Court of Appeals for the Fifth Circuit.

September _____, 1981

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the below listed counsel of record has been served with three copies of the enclosed brief by depositing the briefs in the United States mail on the _____day of September, 1981, in a postage-paid envelope and addressing the envelope to the counsel listed.

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